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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-109

THE UNNAMED PHYSICIAN,
Petitioner,

v.

MARYLAND COMMISSION ON MEDICAL DISCIPLINE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals of Maryland reported at 285 Md. 1, 400 A.2d 396 (1979).

JURISDICTION

Petitioner states that this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). Respondent believes that this is incorrect and that the basis for this Court's jurisdiction is 28 U.S.C. §1257(2). The other statements set forth in the Petitioner's jurisdictional statement are adopted by the Respondent.

QUESTIONS PRESENTED

1. Does Article 43, § 130 of the Annotated Code of Maryland which establishes the Commission on Medical Discipline of Maryland and empowers that agency to take disciplinary action against licensed physicians violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Assuming that records of an in-hospital physician review committee contain information regarding patients, would compliance with a subpoena issued by the Commission on Medical Discipline of Maryland for such records violate a patient's right of privacy?

STATEMENT OF THE CASE

The Commission on Medical Discipline of Maryland (the "Commission") is an agency of the State of Maryland responsible for taking disciplinary action against physicians licensed in Maryland when it deems such action is appropriate. The Commission is composed of nine members, each of whom is a practicing physician. Article 43, § 130 of the Annotated Code of Maryland sets forth nineteen separate grounds upon which the Commission may discipline a physician. This provision also requires that the Commission refer all complaints to a committee of the state medical society or to a county medical society for investigation, report and recommendation.

Pursuant to a complaint, the Commission initiated an investigation into Petitioner's medical practice. In connection with this investigation the Commission issued subpoenas to Frank W. Baker, Jr., M.D., President of the Medical Staff, St. Joseph Hospital, Arthur C. Cocco, M.D., Chief of Medicine, St. Joseph Hospital, and Sister Marie Cecelia, to obtain records and testimony concerning the privileges and practices of the Petitioner at St. Joseph Hospital. After being advised that its subpoenas would not be obeyed, the

Commission, on October 26, 1976, petitioned the Circuit Court for Baltimore County, Maryland for enforcement of its subpoenas. Sister Marie Cecelia was not joined in that action since counsel for St. Joseph Hospital and Drs. Cocco and Baker had previously informed the Commission that the materials, information and testimony requested were under the control of Drs. Cocco and Baker.

Following the successful intervention by the Petitioner, Judge H. Kemp MacDaniel, (now an Associate Judge of the Court of Special Appeals of Maryland), by Order dated May 4, 1977, granted the Commission's petition. Judge MacDaniel held that "proceedings, records and files" of a medical review committee which Article 43, § 134A(d) of the Annotated Code of Maryland generally protects from discovery were subject to the Commission's subpoena power.

On appeal by both the Petitioner and Drs. Cocco and Baker, the Court of Special Appeals of Maryland concurred with the Circuit Court's decision. However, the Circuit Court decision was reversed and remanded on the ground that the subsequent enactment of Chapter 173, Laws of Maryland, 1977, codified as Article 43, § 130A of the Annotated Code of Maryland, insulated "minutes" and "notes" from the Commission's subpoena power and required a modification of the subpoenas issued to Drs. Cocco and Baker.

Upon a writ of certiorari issued to the Petitioner, the Court of Appeals of Maryland affirmed the judgment of the Court of Special Appeals in part and reversed it in part, reinstating the Order of the Circuit Court enforcing the Commission's subpoenas.

REASONS FOR DENYING THE WRIT

The Court of Appeals of Maryland held that materials developed in an in-hospital physician review proceeding are subject to the Commission's subpoena

power. Petitioner asks this Court to review this decision for two reasons. First, he claims that this result violates a patient's right of privacy. Second, he believes that the system established in Maryland for investigating and disciplining licensed physicians violates due process. No authority is cited as support for Petitioner's claims. Analysis of this Court's prior decisions rejecting similar claims demonstrates that the Court of Appeals' decision is correct. Moreover, review of the Court of Appeals' decision indicates that the central issue in this case is the interpretation of Maryland statutes dealing with Commission access to in-hospital physician review committee records. For these reasons, this case does not merit review by this Court.

I.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS REGARDING PATIENT'S PRIVACY RIGHTS.

The lower court held that materials developed in an in-hospital physician review proceeding are subject to the Commission's subpoena power. Petitioner claims that the release of such information would violate a patient's right to privacy. While Petitioner professes concern for patient's rights, his real interest is the "sanctity" of the in-hospital physician review process. Analyzing Maryland statutes, the Court of Appeals found that the general protection agninst discovery and admissability of in-hospital physician review activities is not applicable to the Commission. In his brief, Petitioner criticizes the Court of Appeals' interpretation of Maryland law. Such an argument is, of course, not properly addressed to this Court. However, Petitioner seizes upon the privacy claim in an attempt to achieve through the back door what he cannot obtain through the front.

Petitioner cites *Roe v. Wade*, 410 U.S. 113 (1973), and *Whalen v. Roe*, 429 U.S. 589 (1977), arguing that

compliance with the Commission's subpoenas would violate a patient's constitutional right of privacy. Apart from Petitioner's assumption that the materials subpoenaed by the Commission will include patient records, a fact not altogether clear from the record, Petitioner's reliance upon *Whalen v. Roe, supra* is misplaced.[1] In *Whalen*, this Court considered a New York statute which required physicians who prescribed Schedule II drugs[2] to forward a copy of the prescription to the New York State Department of Health. Prescriptions for Schedule II drugs had to be written on an official form which required identification of the prescribing physician, dispensing pharmacy, drug and dosage, and the patient's name, address and age. Upon receipt, the State Department of Health recorded this data on computer tapes. Public disclosure of this material was statutorily prohibited and access was limited to certain health department and investigatory personnel. Reversing a lower court decision, Justice Stevens, speaking for an unanimous Court, upheld the reporting requirement. He stated:

> Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.
>
> * * *
>
> We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

[1] For the reasons set forth below, this brief does not address the issue of Petitioner's standing to assert a patient's constitutional right of privacy.

[2] Schedule II is a classification of drugs which includes the most dangerous of the legitimate drugs which may be prescribed. Included are such drugs as opium, cocaine, methadone, amphetamines and methaqualone.

> Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.
>
> The third possibility existed under the prior law and is entirely related to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. *And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarrranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.* (footnotes omitted) (emphasis added) Id. at 598-602.

In the instant case, the only way in which a patient's records will be subject to public disclosure is if they are introduced in a Commission proceeding and become part of the record on appeal.[3] There are many ways in which a court can protect patient records from public disclosure (i.e. sealing the record, *in camera* proceedings). Petitioner assumes that judicial supervision will be inadequate protection against unwarranted disclosures. Such a claim was explicitly rejected by this Court in *Whalen*. Therefore, it is clear that the Maryland system for disciplinary physicians set forth in Article

[3] Article 43, § 130(q) states that Commission records are inadmissible in civil or criminal actions; Article 43, § 130(g) makes materials developed in Commission investigations confidential until the Commission takes final action; and Article 76A, § 3(c)(i) prohibits the Commission from releasing medical data.

43, Section 130, like the reporting system considered in *Whalen*, is facially constitutional.

Moreover, the Supreme Court in *Whalen* recognized that privacy interests must give way to the need for disclosure of patient record to regulatory agencies such as the Commission. Justice Stevens stated:

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care . . . . [*D*]*isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.* (footnotes omitted) (emphasis added) *Id.* at 602.

The Commission needs patient medical records to fulfill its public duties. When this interest is coupled with the fact that the materials obtained receive adequate protection from public disclosure, it is clear that the constitutional right of privacy is not violated by disclosure of patient medical records to the Commission.

It is also important to note that the Maryland legislature has recognized the need for protection of patient medical records by enacting Chapter 728, Laws of Maryland, 1978, codified as Article 43, § 54L and Article 48A, § 354M.[4] This statute provides generally

[4] In Maryland, there is no common law physician-patient privilege. *O'Brien v. State,* 126 Md. 270, 94 A. 1034 (1915). Communications between a psychiatrist or a psychologist and a patient are, however, protected. Section 9-109 of the *Courts* Article, Annotated Code of Maryland.

that providers of medical care and nonprofit health service plans may not reveal patient medical records to "any person" unless an authorization is received from the patient. However, the Commission is exempt from this provision either as a "governmental agenc[y]" performing its lawful duties under Article 43, § 54L(c)(4) and Article 48, § 354(c)(4) or as a "medical review committee" under Article 43, § 54L(c)(2) and Article 48, § 354(c)(2). The Maryland legislature in this statute, like this Court in *Whalen*, balanced the patient's desire for privacy against the Commission's need for information and determined that public interest requires that the Commission receive patient medical records. If Petitioner's claim of privacy protection is accepted, not only will this statute fall, but the Commission's ability to effectively pursue its statutory purpose will be severly hampered, if not completely destroyed.

II.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DUE PROCESS DECISIONS.

Petitioner also claims that Article 43, § 130 which establishes the Commission and sets forth its procedures is unconstitutionally vague. He contends (i) that the provisions relating to confidentiality are "confusing and conflicting," (ii) that there is no opportunity to respond to charges in an informal way, (iii) that the provisions dealing with judicial review are confusing, (iv) that the physician is given no notice of a complaint or investigation and (v) that there is no limitation on the Commission's power to delegate investigative responsibility because of the Commission's power to contract for the provision of these services. The Court of Appeals rejected these claims. That decision was correct and need not be reviewed by this Court.

Although the Petitioner contends that the alleged defects render the statute void for vagueness, it is clear that many of his assertions involve, instead, claims of alleged procedural defects in the statute. In fact, the only two contentions that seem to fall within the rubric of "void for vagueness" are his assertions that the provisions relating to confidentiality and judicial review are confusing.

There are two specific sections in Article 43, § 130 which may be characterized as confidentiality provisions.

Article 43, § 130(g) states in pertinent part:

> All investigations, reports and recommendations shall be considered *confidential* until such time as a final action is taken by the Commission. (emphasis added)

Article 43, § 130(q) states:

> The records of any proceeding before the Commission or any of its investigatory bodies or any order passed by the Commission may not be *admitted into evidence* in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible. (emphasis added)

It is hard to see how these sections are at all confusing or conflicting. The former section provides that "investigations, reports and recommendations" shall be "confidential" until the Commission takes final action. Following the receipt of a report and recommendation from an investigatory body, the Commission has several options. It may determine to charge the physician, hold a hearing and take whatever disciplinary action it deems appropriate if it finds the

physician guilty of the charges alleged. Alternatively, the Commission may decide that based on the investigation conducted, no action should be taken against the physician in question. Pn such cases, no charges are filed, no hearing held and no findings of fact and conclusions of law made. Regardless of the course of action taken, it is clear that a final action results, and Section 130(g) confidentialty ends, either when the Commission enters its order following a disciplinary hearing or when it determines not to file charges against the physician who was investigated.[5] This result is completely consistent with Article 43, § 130(q), which provides that records of Commission proceedings and investigations and Commission orders are not admissible in civil or criminal proceedings. Petitioner confuses the Section 130(g) *confidentiality* of "investigations, reports and recommendations" which applies only prior to a final decision by the Commission with the Section 130(q) *inadmissibility* of Commission records and orders in civil and criminal actions. Recognizing the different focus of Article 43, §§ 130(g) and (q), it is hard to see how these provisions are at all inconsistent or unclear.[6]

Petitioner also argues that Article 43, § 130(q) renders the record of a disciplinary proceeding before the Commission and the Commission's order inadmissible in an appeal of a Commission decision. This claim presents an issue of State law that was decided by the

[5] In cases in which no charges are filed the Commission notifies the complaining party and the physician being reviewed of the results of the investigation.

[6] It should be noted that even after the Commission takes final action under Article 43, § 130(g), public access to Commission files is denied pursuant to Article 76A, §§ 3(b)(i) and 3(c)(i). Section 3(b)(i) permits the Commission to deny access to investigatory files; Section 3(c)(i) requires that the Commission keep medical data contained in its files confidential at all times.

Courts of Appeals. Hence, this issue is not properly before this Court.

However, if the Court considers this contention, it is clear that the Maryland legislature could not have intended such a result. Petitioner's reading of this section renders the physician's statutory appeal rights under Article 43, § 130(p) and Article 41, § 255 nugatory, a result which would unquestionably be a due process violation. The Court of Appeals refused to accept a construction of Article 43, § 130(q) which would yield this unconstitutional result. Indeed, Petitioner's construction of Article 43, § 130(q) is inconsistent with his own goals. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Casey Development Co. v. Montgomery County*, 212 Md. 138, 129 A.2d 63 (1957). If a statute is capable of more than one construction, it should be given the reading that will effectuate or carry out its purpose. *Kimbrough v. Giant Foods, Inc.*, 26 Md. App. 640, 339 A.2d 688 (1975). The purpose of Article 43, § 130(q), like the purpose of Article 43, § 134A, is to encourage physicians to participate in the peer review process without fear that discussions of their colleagues will fall into the hands of malpractice plaintiffs. The legislature, in enacting these provisions, recognized that this process would be inhibited if this protection were not afforded. Even if the physician appeals a Commission decision, the record upon which the appeal is based is still inadmissible in a malpractice action. Article 43, §§ 134A(d) and 130(q). Accordingly, analysis of Article 43, § 130(q) indicates quite clearly that the legislature, in utilizing the term "civil," could not have intended that this provision apply to an appeal of a Commission decision.[7]

[7] A reading of this section in connection with Article 41, § 244, *et seq.* (Maryland Administrative Procedures Act) and the Maryland Rules of Procedure, Rule B1, *et seq.*, further indicates that the legislature could not have intended appeals of Commission decisions to be included in Article 43, § 130(q).

The remaining deficiencies alleged by Petitioner, though placed under the rubric of void for vagueness, upon closer analysis, constitute claims that Article 43, § 130 violates procedural due process. Although in the administrative context due process does not require any particular form of proceeding, the minimum requirements necessary to survive a due process attack are jurisdiction, adequate notice and a fair hearing. *Withrow v. Larkin,* 421 U.S. 35 (1975), *Bell v. Burson,* 402 U.S. 535 (1971). *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961); *Union Investors, Inc. v. Montgomery County,* 244 Md. 585, 224 A.2d 453 (1966); *In re Easton,* 214 Md. 176, 133 A.2d 441 (1957); *Albert v. Public Service Commission,* 209 Md. 27, 120 A.2d 346 (1946). Petitioner asserts that due process requires an opportunity to respond to a complaint in an informal way and notice of a complaint or investigation. Petitioner further argues that there is no limitation on the Commission's power to delegate investigatory responsibility.

Petitioner cites no authority, and none can be found, which asserts that it is constitutionally required that a physician be notified of a complaint or investigation[8] or be afforded an opportunity to respond to a complaint in an informal way. Indeed, the Court of Appeals correctly held that it is at the adjudicatory stage of administrative proceedings that a party must be afforded notice of charges and an opportunity to be heard. *Montgomery County v. Woodward & Lothrup,* 280 Md. 686, 376 A.2d 483 (1977), *cert. den.* 434 U.S. 1067 (1978). *Banach v. State Commission on Human Relations,* 277 Md. 502, 356 A.2d 242 (1976) *Ferguson v. United Parcel Service,* 270 Md. 202, 311 A.2d 220 (1973), *cert. den.* 415 U.S. 1000 (1974). Although not required in actual practice,

[8] In *Dixon v. State Board of Optometric Examiners,* 565 P.2d 960 (Colo. 1977) the Supreme Court of Colorado held that due process does not require two notices — one at a time of the initiation of the proceeding and one at the time of the hearing.

both the committee conducting the investigation and the Commission often afford a physician the opportunity to meet informally to discuss the complaint and its investigation.[9]

Petitioner's final assertion is that the Commission's power to delegate investigatory responsibility is unconstitutionally broad because of its power to contract for investigatory services. Article 43, § 130(g)(1) requires that the Commission refer a complaint to a committee of the state medical society or to a local component society for investigation. Article 43, § 130(g)(4) which permits the Commission to contract for investigative services, merely facilitates the investigation mandated by Section 130(g)(1). Article 43, § 130(g)(4) states in pertinent part:

> To facilitate the investigation and prosecution of cases coming before it, the Commission may enter into contracts for the purchase of investigatory and related services and to make these services available to the Medical and Chirurgical Faculty of the State of Maryland, its committees, and local county medical societies.

Clearly, Article 43, § 130(g)(4) does not give the Commission the unlimited power to delegate its investigative functions. Even if one posits that an overly broad delegation of the power to investigate complaints would constitute a constitutional violation, this is certainly not the case when one considers the statutory provisions relating to the powers of the Commission.

[9] In the instant case, Petitioner met with the Baltimore City Medical Society to review the complaint and with the Commission on an informal basis to discuss the alleged difficulties.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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